No. 12,516

IN THE

United States Court of Appeals

For the Ninth Circuit

FOON GOON MOK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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JURISDICTION STATEMENT.

Appellant filed a Petition for Naturalization under the provisions of Section 324(a) of the Nationality Act of 1940 (8 U.S.C.A. 724 (A)) in the United States District Court for the Northern District of California, Southern Division, on the 28th day of February, 1949 (T. 2-6). His Petition for Naturalization was denied by District Judge Louis E. Goodman on December 13, 1949, upon the ground that the petitioner had failed to establish his good moral character for the required period of time (T. 13-14). Notice of appeal was filed with the Clerk of the District Court on January 11, 1950 (T. 15).

Jurisdiction of the District Court to entertain the Petition for Naturalization is conferred by Section

301 of the Nationality Act of 1940 (8 U.S.C.A. 701). Jurisdiction of the Court of Appeals to review the District Court's final order is conferred by Section 128 of the Judicial Code, as amended (28 U.S.C.A. 1291).

The order of the District Court in denying the petitioner's application for United States citizenship is a final decision within the meaning of Section 128 of the Judicial Code. (See *Tutun v. U. S.*, 270 U.S. 568, 46 S. Ct. 425, 70 L. Ed. 738.)

STATEMENT OF THE CASE.

The appellant, a 38 year old male, native of China, came to the United States about 1930, and on October 7, 1942, entered the United States Armed Forces and at that time he claimed birth in the United States. He served outside the continental limits of the United States from March 5, 1943, to September 17, 1945, a period of two years and six months, and was honorably discharged from the Army on September 26, 1945, and he was in the Army a few days less than three years. The appellant served in the European-African-Middle Eastern theatres of war and was awarded a ribbon with one silver and two bronze battle stars and five overseas service bars.

He applied for a United States passport in Chicago, Illinois on July 12, 1946, and at that time falsely claimed United States citizenship and in seeking his reentry in the United States in August, 1948, he likewise claimed birth in the United States.

The appellant appeared as a witness in a naturalization proceeding for a friend in 1946 at which proceedings the appellant claimed he was a citizen of the United States, and later as a witness for the same person when this man applied for a United States passport.

The appellant gave false information concerning his marital status at the time he entered the Army, before a United States consul and in seeking reentry in the United States. Appellant denied he had been married although, at that time, the applicant had been married and subsequently re-married the same Chinese woman. The first marriage was according to Chinese custom prior to his original entry and the second time in the American consul's office after he returned to China and after he received the passport in 1946. Petitioner was detained in Honolulu on his return from China and on August 15, 1948, and frankly admitted before the Immigration Service that he was born in China and his marriage.

No criminal indictment was founded, and appellant has never been arrested nor charged with crime.

The Immigration and Naturalization Service has ordered that appellant be excluded from admission to the United States and has stayed the execution of the outstanding excluding order pending final determination of appellant's petition for naturalization (T. 17).

On February 29, 1949, appellant filed his Petition for Naturalization under Section 324 (a) of the Nationality Act of 1940, and two verifying witnesses ap-

peared before a representative of the Immigration and Naturalization Service, said verifying witnesses being citizens of the United States, and said verifying witnesses stated that they had personal knowledge that petitioner is a person of good moral character. On March 1, 1949, a further affidavit was executed attesting to the fact that the affiant had known the appellant since September, 1948, and that appellant is and during the period between September, 1948, and the date of the affidavit, to-wit, March 1, 1949, was a person of good moral character.

On December 13, 1949, appellant's Petition for Naturalization, upon recommendation of the Immigration and Naturalization Service, was denied by the Honorable Louis E. Goodman, United States District Judge, for the reason that the appellant "has failed to establish his good moral character for the required period of time" (T. 14).

SPECIFICATION OF ERRORS.

1. That the District Court erred in finding that said appellant had not established good moral character as required by Section 324(a) of the Nationality Act of 1940 (8 U.S.C.A. 724(A)).

2. That the District Court erred in denying appellant's Petition for Naturalization as a citizen of the United States.

SUMMARY OF APPELLANT'S ARGUMENT.

The problem here is to determine whether the appellant failed to establish good moral character before the District Court and, assuming that he failed, for what period prior to the filing of his application for naturalization was the Court justified in considering in determining whether the appellant possessed good moral character as required under the specific section of the Nationality Act under which appellant filed his petition.

ARGUMENT.

DOES THE TESTIMONY SHOW THAT APPELLANT HAS FAILED TO ESTABLISH HIS GOOD MORAL CHARACTER?

The recommendation of the designated examiner and his testimony in Court sets forth the following facts upon which it is claimed that appellant has failed to establish his good moral character:

1. He claimed birth in the United States when he entered the armed forces of the United States on October 7, 1942.

2. He applied for a passport on July 12, 1946, at which time he claimed to be a citizen of the United States.

3. At the time of his reentry into the United States in August, 1948, appellant claimed he was born in the United States.

4. Appellant appeared as a witness in a naturalization proceeding in 1946 and later as a witness for

the same person when that person applied for a United States passport.

5. Appellant gave false information concerning his marital status at the time he entered the Army, before a United States Consul and in seeking reentry into the United States.

It thus appears that the appellee bases its order upon three premises.

Firstly, appellant's various claims to birth in the United States; secondly, appellant's appearance as a witness in a naturalization proceeding; and, thirdly, appellant's false statement concerning his marital status.

It should be noted, with regard to the second category, that the person who was naturalized, with the appellant as a witness, was qualified to be a citizen of the United States.

Likewise, appellant's false statements concerning his marital status does not seem to have resulted in anyone having been hurt. When he entered the Army he could have had an allotment made to his spouse the greater portion of which the government would have paid had he disclosed his marriage. By stating that he was single he did not cost the government this additional amount. Moreover, appellant believes, in connection with this alleged false claim, that this Court should keep in mind the fact that appellant's first marriage was in accordance with Chinese tradition and that a question has arisen before the Immigration and Naturalization Service as to the validity of such marriages. Such marriages occur without any

license or recordation of the fact and without any legal document to substantiate the marriage or any entry upon any public or ecclesiastical record. No clergyman or state officer officiates at such weddings and the ceremony seems to be nothing more than a statement by the participants that they are husband and wife and the drinking of tea together. Because of the attitude of the Immigration and Naturalization Service in questioning these marriages, a custom has now arisen among the Chinese of remarrying their spouses before the American consul in one of the cities in China or Hong Kong so that permanent recordation may be made of the fact. Obviously appellant would have been precluded in participating in this marriage and having it solemnized before the American consul had he disclosed the previous marital status.

Appellant urges that the two latter premises upon which the appellee bases its order, while serious, are not sufficient to show that he does not have good moral character. Such false statements do not seem to have harmed anyone nor do they seem to have been the type of conduct that would outrage the moral feelings of his neighbors.

Appellant did not produce, as others who have had their application for naturalization denied, any false documents purporting to show that he was a native born citizen nor any fraudulent birth certificate nor perjured statements. Also, unlike other applicants, appellant has never been charged with crime either arising out of his false claim to native birth or for any other violation of any law either under the statutes

of the United States or any state. Appellant's alleged bad moral character occurred subsequent to his honorable discharge from the United States Army.

The meaning of the expression in the Nationality Act of "good moral character" has been the subject of some concern. However, in *Petition of R.....*, (56 F. Supp. 969) the Court held:

> "By using in the Nationality Act a phrase so popular as 'good moral character' Congress seems to have invited judges to concern themselves not only with the technicalities of the criminal law, but also with the norms of society and the way the average men of good will act."

This Court, in the case of *United States of America v. Samuel Harrison,* decided March 24, 1950 (No. 12,354), sets forth the test in the words of Mr. Justice Bone as follows:

> "Whether the moral feelings now prevalent generally in this country would be outraged by the *conduct* in question."

Appellant respectfully urges that the action of appellant in claiming citizenship in the United States and by accepting the burdens of this citizenship which placed him overseas and in the Army for a few days less than three years, in active theatres of the war, and which resulted in his being awarded a ribbon with one silver and two bronze battle stars and five overseas service bars does not outrage the moral feelings now prevalent generally in this country. Appellant finds himself in a position of a man who apparently loved the United States to such an extent that he, like

other citizens, served and served honorably at a time of great need.

The District Judge recognized that the deportation order against one who had served as honorably as appellant had was a harsh one when he observed (T. 27):

> "I think it might be considered a harsh rule by the department to deport a man who served so honorably in the Armed Forces."

and again (T. 28):

> "I think that the decision of the Immigration people is somewhat harsh, if his application for citizenship is not approved, in deporting him in view of his honorable service in the armed forces."

When we consider that the appellant will not only be deported should his appeal be denied, but deported to a country whose present government and ideology is at variance with the principles to which appellant gave almost three years of his life in Germany, Africa and Italy, merely because the appellant claimed to be born in the United States, appeared as a witness and testified that he was born in the United States and gave untrue statements concerning his marital status, the decision is both harsh and cruel.

The factual situation with which we are presented here is analogous in all material respects to those considered in a series of cases recently before the Board of Immigration Appeals involving applications for suspension of deportation under Section 19 c (2) of the 1917 Immigration Act. These cases are all considered in the *Matter of K.....*, No. A6045024, de-

cided by the Board on February 1, 1949, and reported in May, 1949, Monthly Review (Vol. VI, No. 11). *The aliens in each of these cases made false claims to American citizenship within the period of time in which they were required to establish their good moral character under the applicable statute.* We quote the following from the reported case:

> "Before discretionary relief will be granted by suspension of deportation, the respondent must appear to be a person of good moral character during the past five years and it must appear that such deportation of the respondent will result in serious economic detriment to his citizen wife and child (Sec. 19 (c) of the Immigration Act of 1917). *In this case the effect of the respondent's false claims to citizenship upon a possible finding of good moral character must be considered.*
>
> "While this Board has denied suspension in the case of an alien falsely and knowingly claiming citizenship after institution of deportation proceedings (Matter of W....., 55933/565, September 24, 1943), it has held suspension proper where an alien claimed citizenship in applying for a job and registering for selective service (Matter of B....., 6033312, affirmed by A. G. September 16, 1947). In the instant case, the false statements (uttered prior to the institution of present proceedings) leading to respondent's voting appear to have been prompted by a fear that he would otherwise lose his job. *In the B..... case it was stated that the granting of suspension was merited in the case of an alien whose record is excellent save for false claim of citizenship. In this connection, counsel states in his brief:*

" 'It may not be entirely accurate to state that the appellant's record is excellent but taken generally, it seems to comprise a record of what most American communities would find to be reasonably normal activities and behavior without any serious transgressions of morality, decency or law. He has not acquired a criminal record of any kind, has supported his family, worked steadily and maintained the respect of his friends, associates, and employers. No more is asked of members of our community to qualify them as morally worthy and of satisfactory reputation.'

"Upon a number of occasions this Board has spoken regarding the character which an alien must possess in order to be granted administrative relief. In the Matter of K....., 6092065 (November 3, 1947), we stated: 'While we do not condone respondent's illegal actions in misrepresenting himself as a citizen, we nevertheless do not think that he is precluded from establishing his good moral character.' *The illegal actions involved therein were false claims of citizenship in obtaining employment, in draft registration, and in registering to vote, for which the alien was convicted of violating Section 746 (a), Title 8, U.S.C.,* granted a suspended sentence and placed on probation. We have also stated in the Matter of P....., 4383150 (November 17, 1947) that '*The general tendency has been not to construe good moral character to mean moral excellence, nor to hold that it is destroyed by a single lapse.* It is relative and measured by considering the particular person's actions generally and the regard in which he is held by the community as a whole.' *Since the acts involved in the*

instant case are similar and in a series (with each succeeding false claim being uttered merely to conceal previous statements), respondent may be regarded as being guilty in fact of but one such lapse, for which he has made amends." (Emphasis added.)

Everything that has been said by the Board in these deportation cases would apply with like effect here, and the remarks of the Board quoted from its opinion in the *Matter of P.....*, would be just as pertinent if directed to the facts of this case as they were in the one in which they were made.

FOR WHAT PERIOD PRIOR TO THE FILING OF THE CITIZENSHIP PETITION WAS THE COURT JUSTIFIED IN CONSIDERING APPELLANT'S CONDUCT?

The appellant's misconduct terminated on August, 1948, at which time he frankly admitted he was born in China. His Petition for Naturalization was filed on February 28, 1949, under Section 324(a) of the Nationality Act of 1940 as amended. This section is unlike other provisions of the Nationality Act in that there is *no residence requirement and no prescribed period of time during which good moral character must be shown as a prerequisite to naturalization.* The Congressional Report which accompanied the bill states that its purpose is to make it possible for aliens who have served honorably in the Armed Forces to acquire citizenship through naturalization without the necessity of going through certain processes required of non-service people. The problem to be determined

is for what period of time the appellant must establish he has been a person of good moral character.

In *Application of Murra* (178 F. (2d) 670, Circuit Court, Seventh Circuit, rehearing denied January 31, 1950) a petition was filed under Section 307 (a) of the Nationality Act of 1940 (8 U.S.C.A. 707 (a)) which prohibits naturalization unless "immediately preceding the date of filing petition for naturalization the petitioner has for at least five years been and still is a person of good moral character." The government's contention that the naturalization Court may inquire into the entire life history of the petitioner to ascertain his true character and inclination was rejected, and the Court held that the government in its inquiry as to the fitness of an applicant for naturalization, under this five year residential section, is confined to the five year period immediately preceding the filing of petition for naturalization. The Court observed:

> "We cannot believe that Congress meant other than what it said, that is, that if a petitioner meets the enumerated requirements for a period of five years immediately prior to the filing of his petition he is entitled to be admitted. We need not decide that a court is never justified in making inquiry concerning a petitioner previous to the five year period, but what we do think and hold is that even so the fact developed by such an inquiry cannot be used as the basis for disqualification."

The section under which appellant filed his petition has deleted both the residential requirement and the prescribed period of time during which good moral

character must be shown and there does not seem to be any authority as to the time that appellant must show good moral character. However, in the Monthly Review of the Immigration and Naturalization Service for November, 1948, at page 58, the following appears:

> "An applicant within the excepted class (not required to have continuous residence in the United States for five years) need only establish that he has been a person of good moral character during the abbreviated period of residence applicable to his class."

In the article entitled "Trends Towards Uniformity in Naturalization Decisions", by Edward Rudnick, Supervisor of Citizenship Certificate Unit of the Office of Adjudications, Immigration and Naturalization Service, in the July, 1947 issue of the Service's Monthly Review, the following appears:

> "The courts are in general agreement with the Service view that where the required period of residence is less than five years the *applicant need prove good moral character only for the required period.*" (Italics added.)

It should be reiterated that applicant was not required to have any period of residence.

Appellant respectfully urges that from a reading of the section under which appellant filed his petition and the *Murra* decision it is logical to conclude that the intention of the Congressional enactment of Section 324(a) was that petitioners under that section are not required to establish that they have been per-

sons of good moral character for any rigidly defined period of time.

In the case of *Jim Yuen Jung v. Bruce G. Barber* (No. 12455, presently pending before the United States Court of Appeals for the Ninth District) the designated examiner in giving his views as to the precise period for which good moral character must be shown stated as follows (Jim Yuen Jung T. 35):

> "The Service feels that on a military case under 324(a)—we have the two separate acts under 324(a) and 324(A), which is the Veterans Act for World War I and II, no particular length of time being required on that. The view is that the petitioner must show good moral character *from the time of the filing of the petition to the date of the hearing,* but that his conduct for a reasonable period prior to the filing may be considered as indicating what his character is as of the filing of the petition." (Italics added.)

The petition was filed on February 28, 1949, and the hearing was had on December 13, 1949, and in this regard (T. 26) the designated examiner stated that he did not think there was any misconduct since August of 1948, a period of one year and four months or thereabouts.

Since Congress has seen fit to remove the time period, appellant respectfully urges that the District Court erred in considering appellant's various false claims prior to August of 1948 as the proof that appellant had not established his good moral character.

CONCLUSION.

Had appellant been properly advised, he could have made application at the time he was honorably discharged from the United States Army after serving the United States well during the war and undoubtedly his petition for citizenship would then have been granted. Unfortunately appellant was either ill-advised or not advised and so when he followed the accepted Chinese custom of visiting his homeland and seeing his family and remarrying his wife before the American Consul he procured the passport which led to his false statement in Chicago and upon his return to the United States. However, appellant was never indicted for these false statements nor informed against, and having been ordered excluded from the United States and having exhausted his administrative remedies, now makes application for naturalization.

> "The fact that deportation proceeding was pending against petitioner did not bar the Federal District Court from considering petition of naturalization of petitioner instituted under 324(a) which permits honorably discharged war veterans to petition for naturalization." *Petition of Warhol* (84 F. Supp. 543).

As Mr. Justice Bone remarked in the case of *United States of America v. Samuel Harrison* (supra):

> "It may well be that in the exercise of a sound discretion in passing upon a petition for naturalization, a court could, with propriety, disregard evidence of some minor offenses not indicative of moral depravity where the record fails to disclose the commission of serious offenses."

Appellant respectfully urges that his false claim to being born in the United States is not indicative of moral depravity in view of the fact that he sought no benefit from this false claim but only the privilege of fighting the enemy of the United States.

PRAYER.

Wherefore, appellant prays that the decision of the District Court be reversed and that he be admitted to United States citizenship.

Dated, San Francisco, California,
May 29, 1950.

KENNETH C. ZWERIN,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix

APPLICABLE STATUTES AND REGULATIONS.

Section 324(a) of the Nationality Act of 1940, as amended, so far as relevant to this proceedings (8 U.S.C. 724 (A)) provides:

"(a) Any person not a citizen who has served honorably in an active-duty status in the military or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States or an outlying possession (including the Panama Canal Zone, but excluding the Philippine Islands), or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether the persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: Provided, however, That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section.

(b) A person filing a petition under subsection (a) of this section shall comply in all respect

with the requirements of this chapter except that—

(1) he may be naturalized regardless of age, and notwithstanding the provisions of section 703 and 726 of this title;

(2) no declaration of intention, no certificate of arrival, *and no period of residence within the United States or any State shall be required;*

(3) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner;

(4) there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each such witness personally knows the petitioner to be a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States;

(6) if no longer serving in the military or naval forces of the United States, the Service of the petitioner shall be proved by a duly authenticated certification from the executive department under which the petitioner served, which shall state whether the petitioner served honorably in an active duty status during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, and was separated from such service under honorable conditions; (Italics supplied.)